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Supreme Court, U.S.
FILED
NOV 27 1987

No. 87-709

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF WISCONSIN,

Respondent,

v.

THOMAS D. TRUDEAU,
TRUDEAU DEVELOPMENT, INC.,
TRUDEAU CONSTRUCTIONS, INC.,
SUPERIOR DEVELOPMENT, INC.,

Petitioners.

and

THE ASHLAND COUNTY BOARD OF ADJUSTMENT
LARRY HILDEBRANDT, ASHLAND COUNTY
ZONING ADMINISTRATOR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION

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57pp

QUESTIONS PRESENTED

1. Did the petitioners raise the questions presented in the petition in the Wisconsin Supreme Court so that the United States Supreme Court could take jurisdiction over the case?

2. Did the Wisconsin Supreme Court "abandon" the common law in this public trust case as the petitioners allege, or is its ruling merely the application of well-established common law principles to a unique factual situation?

PARTIES TO THE PROCEEDING BELOW

In the proceeding before the Wisconsin Supreme Court, the appellants were Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Constructions, Inc., Superior Development, Inc., the Ashland County Board of Adjustment, and Larry Hildebrandt, Ashland County Zoning Administrator. Only Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Constructions, Inc., and Superior Development, Inc. are petitioners in this Court.

The appellee below, the State of Wisconsin, is the respondent in this Court.

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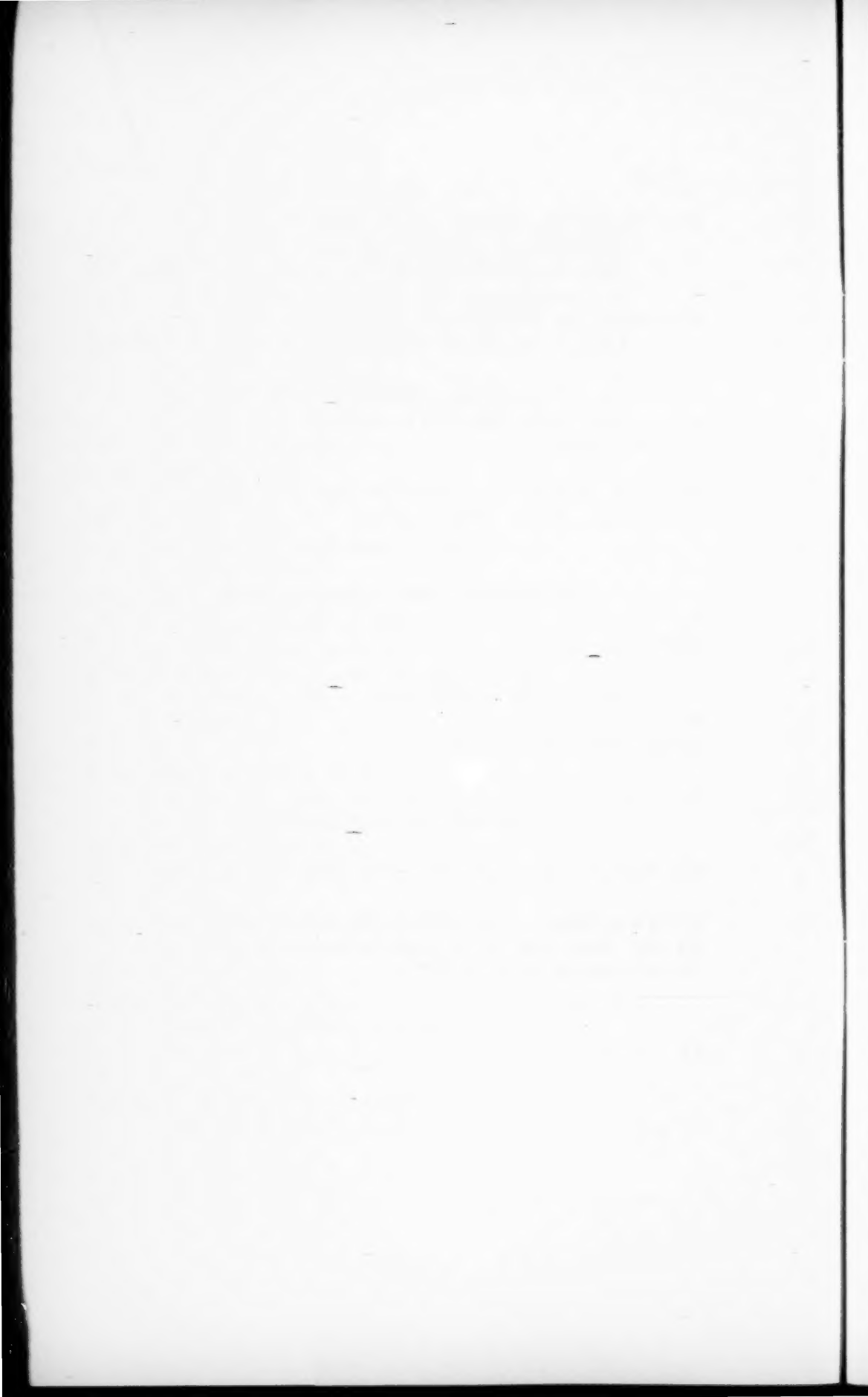
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Wisconsin respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Wisconsin Supreme Court's opinion in this

case. That opinion is reported at 139
Wis. 2d 91, 408 N.W.2d 337 (1987).

STATUTES INVOLVED

Section 30.15(4), - Wis. Stats.

(1985):

OBSTRUCTIONS ARE PUBLIC NUISANCES. Every obstruction constructed or maintained in or over any navigable waters of this state in violation of this chapter and every violation of s. 30.12 or 30.13 is declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or any citizen thereof.

STATEMENT OF THE CASE

This controversy concerns a real estate development known as the "Marina Point Condominiums" on Madeline Island in Lake Superior, the largest body of fresh water in the world. The site the petitioners have chosen for this project is unique in several respects. It lies adjacent to a naturally occurring inlet, shown as a "lagoon" on Exhibit 40

(Appendix 101), which has been used as a port for Lake Superior navigators since at least the early eighteenth century, i.e., more than 100 years before Wisconsin was admitted into the Union. As the state's expert historian, Professor Charles Twining, testified¹ at trial, the French government built a fort next to this inlet to protect the harbor which the inlet provided (R. 101:137).² Other than a bridge which crossed the mouth of this inlet, the natural condition of inlet remained undisturbed until approximately twenty years ago when outer portions of the inlet were deepened

¹In testimony other than that excerpted by the petitioners and included in their appendix as "Appendix L."

²This and other references to the record in this case will be to the record item and page number assigned at the time of the intitial appeal from the trial court.

to form a marina. The land upon which the petitioners have built condominiums, however, was undisturbed in the construction of the marina. Exhibit 33 (a photocopy of which is attached as Appendix 102) shows the condition of the inlet prior to the marina project. The disputed land lies between the open-water portion of the inlet and the golf course shown in the background. The marina and the relocated shoreline road are shown in Exhibit 7, a copy of which is found at page six of the petition. The project site is now connected by several culverts to Lake Superior. The trial court found clear evidence that water flows both ways through these culverts, sometimes draining the Marina Point Condominiums site into the main body of Lake Superior and sometimes further flooding the site

with water coming in from the marina (Petitioner's Appendix at 30a).

The existing structure, a group of six condominiums known as "Cluster A," has been built on stilt-like pilings. Contrary to the petitioners' assertion (Petition at 7), the state disputes the suggestion that it ever authorized construction at the site on pilings or by any other means. As Exhibit 4 (Appendix 103) reveals, Wisconsin officials advised the petitioners to seek an upland site after the first and only meeting with the petitioners before they commenced construction in disregard of this recommendation. The site is largely covered with wetland vegetation and water up to 1.2 feet in depth. In January 1984, after they had already put up the piling, decking and walls of the condominiums, the petitioners obtained an

after-the-fact variance from local floodplain zoning requirements for Cluster A, despite state opposition to the grant of the variance. The State of Wisconsin filed suit on August 16, 1984, alleging that the petitioners had unlawfully encroached upon the bed of Lake Superior, and that Cluster A was constructed in violation of floodplain, conservancy and shoreland setback zoning requirements. Contrary to the petitioners' suggestion (Petition at 7), this was not a criminal prosecution. Section 30.15(4), Wis. Stats., provides that violations of sec. 30.12, Wis. Stats., (unlawful encroachments on lake beds) may be prosecuted by a civil complaint, as here, to abate a nuisance.

At trial the state produced the following additional evidence that the project site is part of a naturally

occurring wetland basin culminating in an open water inlet which has been expanded in recent times as part of the development of the adjacent marina. Exhibit 40 (Appendix 101), a manuscript map describing the shoreline contours of 1852 in the vicinity of the project site, shows an open-water inlet crossing under Old Fort Road and extending east into a wetland on the inland side of the road. The location of that inlet corresponds to the site of the present-day marina (R. 101:135). As noted above, France built a fort immediately south of this inlet in 1718 to protect the harbor which the inlet provided for that country's active fur trade (R. 101:137). Exhibit 80, the original government survey of the Town of La Pointe from 1852, shows an inlet in the vicinity of the project site and a large wetland area immediately opposite

the inlet across Old Fort Road. Exhibit 81, a Town of La Pointe plat map from 1854, similarly shows an inlet connected to Lake Superior crossing beneath Old Fort Road to a wetland area on the inland side of the road. Exhibit 51, a 1964 United States Geological Survey map of the area prior to the construction of the marina, shows the inlet extending across the road to a large wetland area, approximately one-half mile in length, extending north and south of the inlet and inland into sections 32 and 29. Exhibit 30, a 1964 survey of the area prepared in anticipation of the dredging and construction associated with the new marina, shows both open water extending under a bridge from the lake towards the project site and also shows, by use of a dotted line, the contours of the preexisting "swamp"; it might be noted

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that the dotted line does not end before the eastern edge of this map, which is the boundary of the project site. Exhibit 33 (Appendix 102), a photograph taken shortly before construction of the marina, clearly shows the natural state of the land between the main body of the lake and the golf course which abuts the project site on its inland side and shows the open water inlet, bridged by Old Fort Road, extending into a wetland area where the Developers now plan to build condominiums. Photographic Exhibits 16, 34, 36, 38 and 45 all clearly show that in the course of the enlargement of the inlet to form the Madeline Island Marina harbor, and in the relocation of Old Fort Road around the new marina, the project site itself was left undisturbed and in its natural condition, i.e., it was not lowered in elevation as part of the

marina construction process. These exhibits were supplemented by the testimony of the state's engineer and surveyor that the project site was connected by water to Lake Superior before any alterations were made to the inlet. His opinion in that respect was based in part on an examination of aerial stereophotographs taken in 1939 which facilitated his identification of open water areas and wetland vegetation (R. 101:78-84).

The state also introduced undisputed evidence at trial that the elevation of the ordinary high water mark (OHWM) of Lake Superior in the Madeline Island area is 602 feet, in terms of an elevation datum system known as "International Great Lakes Datum" or "I.G.L.D." Although the IGLD elevation of the land underlying Cluster A was disputed, the

trial court declined to make any findings on that subject. The Wisconsin Supreme Court has remanded the case to the trial court for such findings. Under the Wisconsin Supreme Court's mandate, any portion found to be above 602 feet is not to be regarded as lake bed (139 Wis. 2d at 109; Petitioner's Appendix at 23a). The petitioners have taken the position in the trial court on remand that the state has not met its burden of proving that any of the land underlying Cluster A is at or below that elevation. The state's evidence at trial showed that approximately half of the land under Cluster A and 95 percent of the remainder of the project site involved land below 602 feet in elevation (R. 101:68-69). The state's evidence showed that the water on the project site was at essentially the same elevation as water

in the main body of Lake Superior and that some points on the project site are nearly two feet below the OHWM of the lake.

REASONS FOR DENYING THE WRIT

1. The United States Supreme Court cannot take jurisdiction over this case under the authority of 28 U.S.C. § 1257(3) because the petitioners failed to raise the federal questions in the Wisconsin Supreme Court.

The petitioners would invoke this Court's jurisdiction under the authority of 28 U.S.C. § 1257(3) (Petition at 2). Before this Court may assume jurisdiction over such a case, however, the record must indicate that the federal questions did arise in the court below and that the state court decided the federal claims. "If both of these do not appear on the record, the appellate jurisdiction

- fails." Crowell v. Randell, 10 Pet. 368, 392 (1836). See also Hill v. California, 401 U.S. 797, 805, (1971). Because the record shows that the petitioners did not raise the federal issues referred to in their petition for a writ of certiorari when the case was before the Wisconsin Supreme Court, the petition should be denied.

In their brief before the Wisconsin Supreme Court, the petitioners described, as they were required to do by Rule 809.19(1)(b), Wis. Stats., the issues which they were presenting to that court for review. A verbatim listing of the five issues then identified by the petitioners is attached to this brief as Appendix 106. None of those issues bears any resemblance to the issues the petitioners refer to in their discussion of the reasons why they would have this

Court grant their petition for a writ a certiorari. Furthermore, only one of the federal cases cited in this petition, Kaiser Aetna v. United States, 444 U.S. 164 (1979), was even cited in the petitioners' Wisconsin Supreme Court brief.³ Similarly, when the petitioners moved the Wisconsin Supreme Court to reconsider its decision, they again failed to raise any of the federal issues they would now have this court consider. The table of contents and authorities from the petitioners' Memorandum In Support of Motion for Reconsideration in that court is attached to this brief as Appendix 112. Instead, they urged reconsideration solely on the issue of the sufficiency of the evidence

³The irrelevance of that decision to the facts of this case is discussed below in this brief.

in the case. The Wisconsin Supreme Court did not rule on these federal issues for the obvious reason that the petitioners did not raise them in that proceeding. The Wisconsin Supreme Court based its opinion upon well-established and long-standing principles of state law. The petitioners' failure to raise the federal claims in the Wisconsin Supreme Court deprives this court of authority to take jurisdiction of the case under 28 U.S.C. § 1257(3). Accordingly, the petition should be denied.

2. This case does not involve the federal issues identified in the petition for a writ of certiorari.

a. This case does not present the same issues which are pending before this court in Phillips Petroleum Company v. Mississippi.

The petitioners argue at length that this case raises the same issues as Phillips Petroleum.⁴ That argument represents the petitioners' misunderstanding or misrepresentation of the issues and the record in both cases. The issues raised in Phillips Petroleum, as articulated in the petitioners' brief, concern whether "lands under the non-navigable but tidally influenced inland waters"⁵ are

⁴Petition at 14-21.

⁵Brief for Petitioners in Phillips Petroleum, at (i).

part of the public trust properties conveyed to the State of Mississippi at the time of statehood. In Phillips Petroleum, the disputed land, as characterized by those petitioners,⁶ formed the bed of discrete non-navigable drainage streams. The legal issue in Phillips Petroleum concerns whether such lands are public trust tidelands. That case does not concern title to land below the ordinary high-water mark of an inland navigable lake like Lake Superior. The petitioners in Phillip's Petroleum do not challenge, and in fact expressly acknowledge the proposition that

"the public trust ownership of underwater soils has always been confined to soils under navigable waters, which by nature include the non-

⁶See e.g., Petitioners' Reply Brief in Phillips Petroleum, at 5 and 14.

navigable shores and coasts thereof up to the mean high water mark."

Petitioner's Reply Brief at 12. This legal proposition, undisputed in Phillips Petroleum, is the precise basis upon which the State of Wisconsin prosecuted its claim of title to the land underlying these petitioners' condominiums. The state proceeded on a theory that the project site lies at an elevation below the OHWM of Lake Superior and is naturally part of that water body. The petitioners' defense, i.e., that the state could not claim title to soils under water not presently susceptible to navigation, is a notion expressly disavowed by the petitioners in Phillips Petroleum who do not dispute a state's claim to non-navigable shorelands below the OHWM of an otherwise navigable water body.

The Wisconsin courts have resolved the petitioners' factual assertion that the project site is (as the Phillips Petroleum Company argues in its case) some form of discrete water body against the petitioners. The record in this case is replete with evidence⁷ that the property abuts a naturally occurring inlet, as noted in the Statement of the Case, above. It should be emphasized that this case involves an inlet on a small island in a fresh water "sea." Illinois Central Railroad v. Illinois, 146 U.S. 387, 435 (1892). These petitioners go to considerable and factually inaccurate lengths to fashion the water body on the

⁷Notwithstanding the petitioners' delusional assertion that the "Wisconsin Supreme Court's decision . . . is based on a record wholly devoid of evidence," Petition at 27. This is the same argument rejected by the Wisconsin Supreme Court in its disposition of the petitioners' motion for reconsideration.

project site in a manner resembling the Phillips Petroleum Company's characterization of the Mississippi lands when they refer to the site as a "stream" (Petition at 19) or as "water courses flowing into the navigable water", id. While some upland areas of Madeline Island do drain into this area, it definitely is not a "stream." Wisconsin claims title to the land as part of Lake Superior. As indicated above, the water level in the main body of the lake determines the level of water on that portion of the project site claimed by the state. Whenever the elevation of the water in Lake Superior reaches its OHWM, the site will be inundated by water at the same level. Since no water body, from the smallest puddle to the sea, generates its own water, the source of water on the site, a factual issue

belabored by the petitioners, is immaterial to the question of title. Therefore, aside from the distinction that this case does not involve the Phillips Petroleum legal issue of title to tidal lands, this case is factually distinct because it does not involve the kind of "tributary to a tributary to a public water body" described by the petitioners in the Phillips Petroleum case.

- b. The Wisconsin Supreme Court did not adopt a new rule extending the public trust.

The petitioners urge this court to review this case on the basis that the Wisconsin Supreme Court has "radically changed"⁸ its public trust laws by the alleged adoption of a "hydraulic

⁸Petition at 24.

connection test"⁹ which in turn allegedly has "no limiting principle"¹⁰ for determining the point of inland influence. A reading of the Wisconsin Supreme Court's decision in this case shows all of the foregoing assertions to be without the slightest substance. Indeed, from reading the petition it is difficult to believe that the petitioners are referring to the same Wisconsin Supreme Court decision they would have this Court review. Because no new rule was adopted, because the Wisconsin Supreme Court followed well-established principles and applied them correctly to this factually unique situation and because Wisconsin law on public trust

⁹Id. at 23.

¹⁰Id. at 19.

property clearly has limiting principles, the petition should be denied.

This case did not involve the adoption of a new "hydraulic connection" test, as the petitioners insist. The Wisconsin Supreme Court specifically disavowed any such notion when it wrote: "It is obvious that hydraulic connection has no meaning other than being connected by water." 139 Wis. 2d at 105. Instead of fashioning any new rule of law, the Wisconsin Supreme Court simply followed principles recognized in the state for more than a century to the effect that public trust properties include "the beds of all lakes . . . up to the line of ordinary high-water mark", Illinois Steel Co. v Bilot and wife, 109 Wis. 418, 425, 84 N.W. 855 (1901), and that the trust includes lakebed along the shore "whether the

water immediately next to the shore be shoal or deep. For the fee is equally in the public; even the shoal water next to the shore may aid the public use, and may deepen or be deepened, so as to become practically capable of navigation."

Diedrich v. The N. W. U. R'y. Co., 42

Wis. 248, 266 (1877). The Wisconsin

Supreme Court's reference to the term

"hydraulically connected," 139 Wis. 2d at

109, taken in context, means only what

that court said in the same paragraph:

"As long as lake water would naturally

flow to and from the site in the absence

of an artificial barrier, it is a part of

Lake Superior." Id. The subject would

not have been considered but for the

petitioners' defense that the

navigational barrier of Old Fort Road and

its culverts precluded treatment of the

site as lakebed. The effect of the

Wisconsin Supreme Court's decision is that the public is not divested of title to shallow, non-navigable portions of a navigable lake's bed when a road or bridge also restricting navigation is built across the non-navigable portion of lakebed. The unique facts of this case were rendered more complex by the circumstances surrounding the development of the marina, which involved deepening the open-water portion of the inlet between the project site and the main body of the lake. Contrary to the petitioners' argument,¹¹ the marina project with its associated dredging and road relocation did not "create" the hydraulic connection, it nearly cut it off. Thus, the petitioners' reference to Kaiser Aetna v. United States, 444 U.S.

¹¹Petition at 11 and 23.

164 (1979), is entirely misplaced because, contrary to the petitioners' assertion,¹² there is no evidence to even support the notion that the relocation of Old Fort Road caused the site to be flooded for the first time. The evidence in the record shows this site was in its natural and undisturbed condition until these petitioners commenced construction of their condominium project on it.

The petitioners' bald assertion¹³ that the rule applied in this case has no limiting principle is erroneous. The Wisconsin Supreme Court has merely upheld the state's claim to the bed of Lake Superior up to its OHWM. The state does not claim title to all land in Wisconsin below 602 feet in elevation. Neither

¹²Id. at 23.

¹³Id. at 19.

does the state claim title by its proof in this case to all land over which any water flows before it enters Lake Superior. The state seeks to protect from encroachment only those lands first which are a part of the lake and second which lie below the OHWM elevation. The Wisconsin Supreme Court rejected the petitioners' contention that the coastal road prevented the project site from being regarded as lakebed. The state's second contention is the subject of the proceedings remanded to the trial court in which the state must prove the land to be at or below 602 feet IGLD or lose its lakebed claim. The petitioners' argument¹⁴ that there is land which is both below Lake Superior's OHWM and connected to it by water yet not part of

¹⁴Id. at 19.

the lake because it is separated from the lake by land above the OHWM is absurd. Lake Superior would extend to such lands only if water flowed uphill. The well-established Wisconsin principles of lakebed ownership have readily discernible means of determining the limit of the public trust. See, Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

- c. Adoption of the petitioners' interpretation of the extent of Wisconsin's public trust would create chaos and upset long-standing principles of property law.

The essence of the petitioners' arguments is that the public trust should extend only to the navigable portions of navigable water bodies like Lake

Superior.¹⁵ This is a proposition which lacks any support in the law. Neither is it an issue in the Phillips Petroleum case pending before this court, as the petitioners there concede the state's title to such lands. In the comprehensive opinion in Shively v. Bowlby, 152 U.S. 1 (1894) this court held:

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral

¹⁵Alternatively, it seems that while the petitioners might concede that land underlying shoal waters along a cape are publicly held they would argue (Petition at 20) that the beds of shoals in any bay across which an imaginary line may be drawn between headlands must belong to the riparian. Thus, under this argument, title to the bed near shore would be seen to depend on the shape of the shoreline, a novel concept to say the least.

proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

152 U.S. at 57-58, emphasis added. The viability of these propositions has been recognized in modern times. See Or. Ex Rel. State Land Bd. v. Corvallis Sand & G., 429 U.S. 363, 375 (1977), and cases cited therein. As the Wisconsin Supreme Court's decision in this case makes clear, Wisconsin has long held to the proposition that the public trust extends up to the OHWM of navigable lakes, necessarily encompassing some land which may not be covered by navigable water. If the petitioners were to prevail in their arguments, this would truly mark a significant change in state property law.

As Wisconsin law now stands, the state owns land up to the OHWM for present or potential public use.

Diedrich, supra. The public uses recognized by Wisconsin law are many but include, as the Wisconsin Supreme Court has held in this case, the enjoyment of the scenic beauty of wetlands. 139 Wis. 2d 7, 17, 201 N.W.2d 761 (1972).¹⁶ As the Wisconsin Supreme Court decision in this case also makes clear, a good deal of decisional law has been developed in the state to define the property rights of riparians and the public in a wide variety of circumstances relating to the use of shorelands. If the petitioners' interpretation of the extent of the public trust were to be adopted, it would represent a major upheaval in the Wisconsin law of property. This court

¹⁶The petitioners' assertion (Petition at 4) that the project site "cannot be used for . . . recreation, or any other public use" is but another factual dispute which was resolved against them by the State courts.

has held, however, that "[s]ubstantive rules governing the law of real property are peculiarly subject to the principle of stare decisis." State Land Bd., 429 U.S. at 381, citing United States v. Title Ins. Co., 265 U.S. 472 (1924). Wisconsin has approximately 9,000 inland lakes or ponds; Lake Superior's coastline runs for about 125 miles along the northern border of the state and Lake Michigan's Wisconsin shoreline extends for about 325 miles. Ellis, Beuscher, Howard & DeBraal, Water Use Law and Administration In Wisconsin 3 (1970). Disturbing Wisconsin's well-established and long-standing public trust principles would create chaos in the law of riparian and public trust property rights. For this reason, as well as the others cited above, the petition should be denied.

CONCLUSION

The petitioners may not invoke this Court's jurisdiction because they failed to raise the federal issues in the Wisconsin Supreme Court. The Wisconsin Supreme Court's decision was not erroneous and involved only the application of well-established public trust principles to the unique facts of this case. The interpretation of the public trust urged by the petitioners would create chaos for the public and riparian owners along Wisconsin's very extensive lake shorelands. For these

reasons, the respondent respectfully requests that this Court deny the petition for a writ of certiorari.

DONALD J. HANAWAY
Attorney General
of Wisconsin

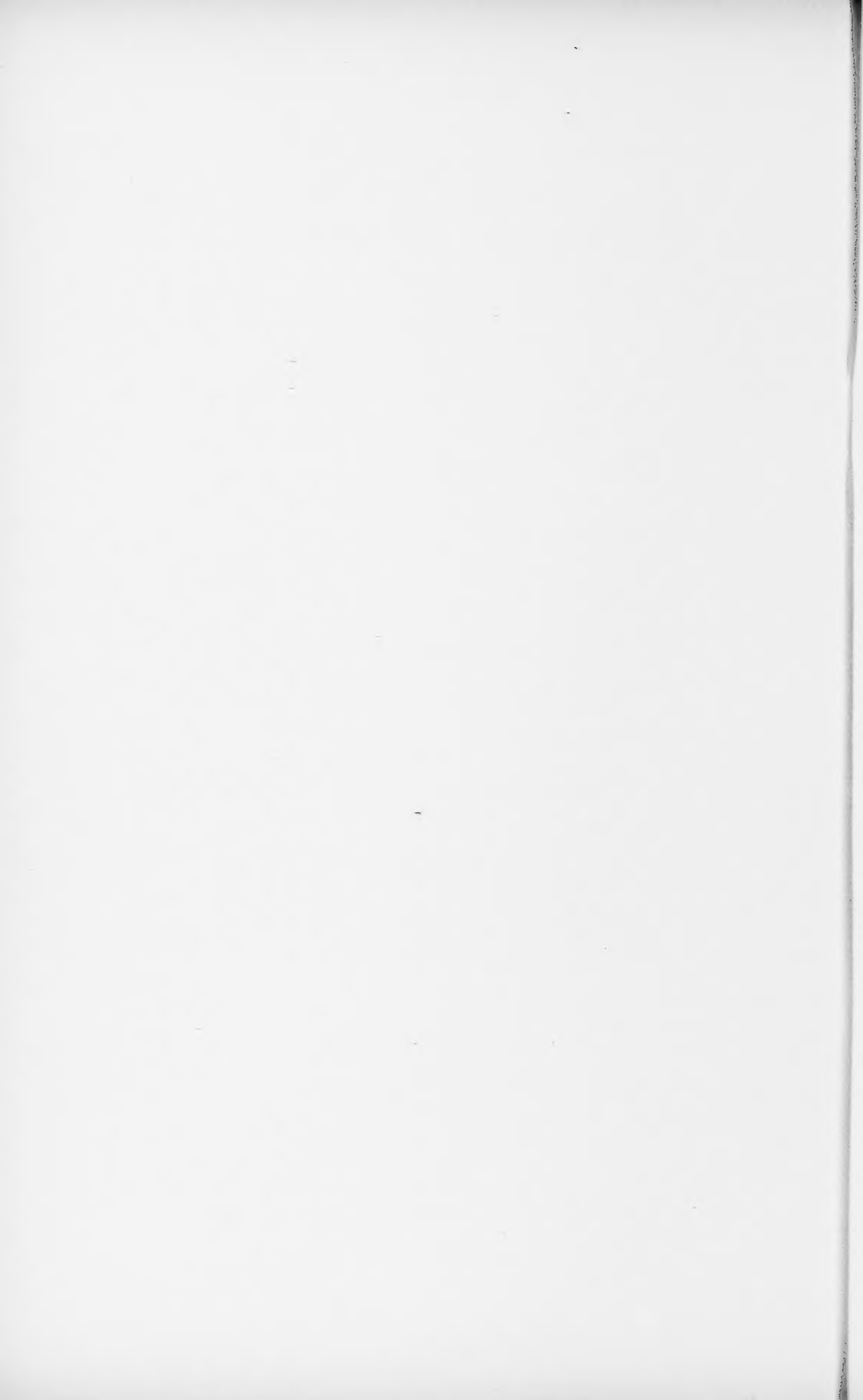
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APPENDIX

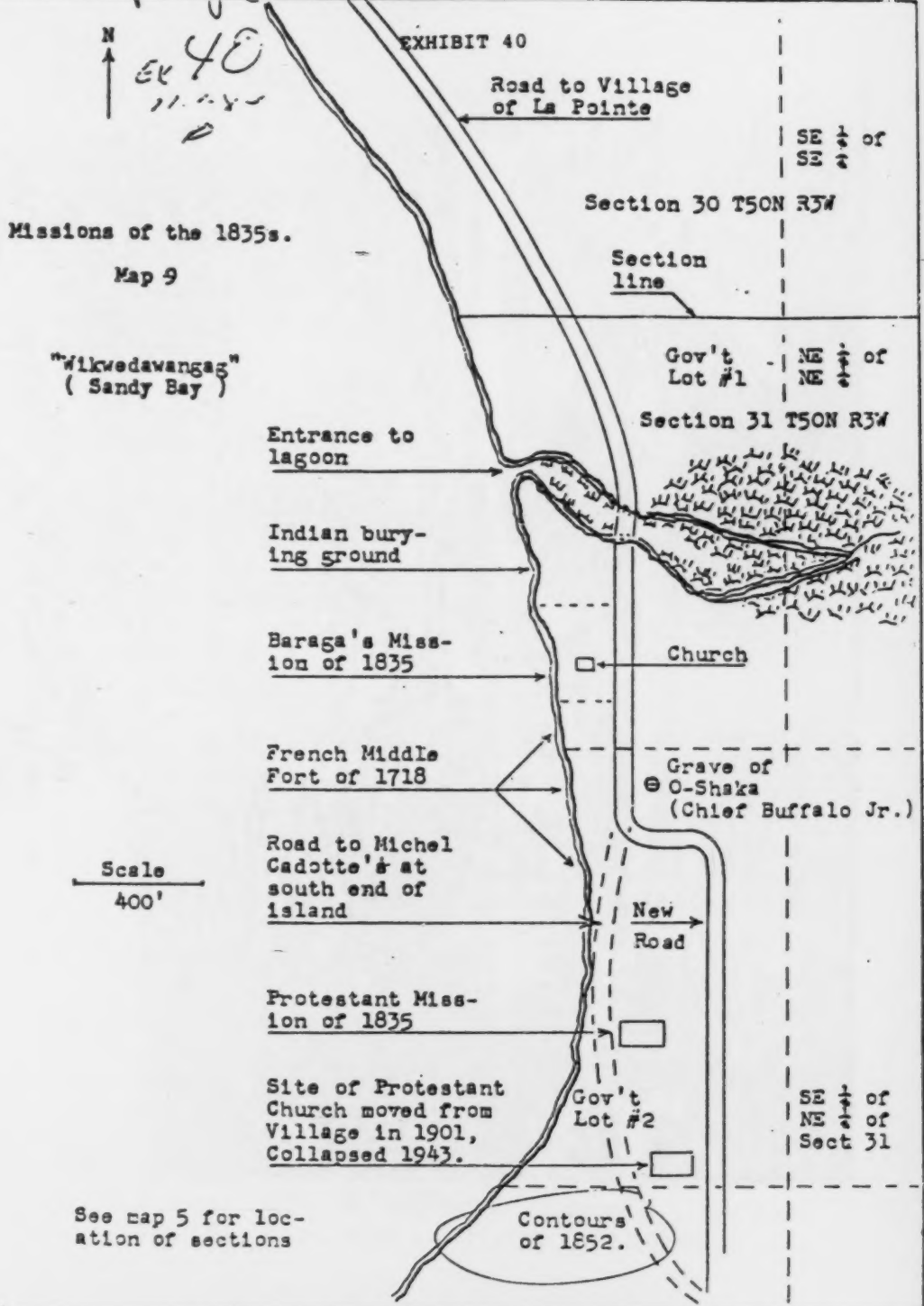


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manuscript map (b. 94, La Pointe)



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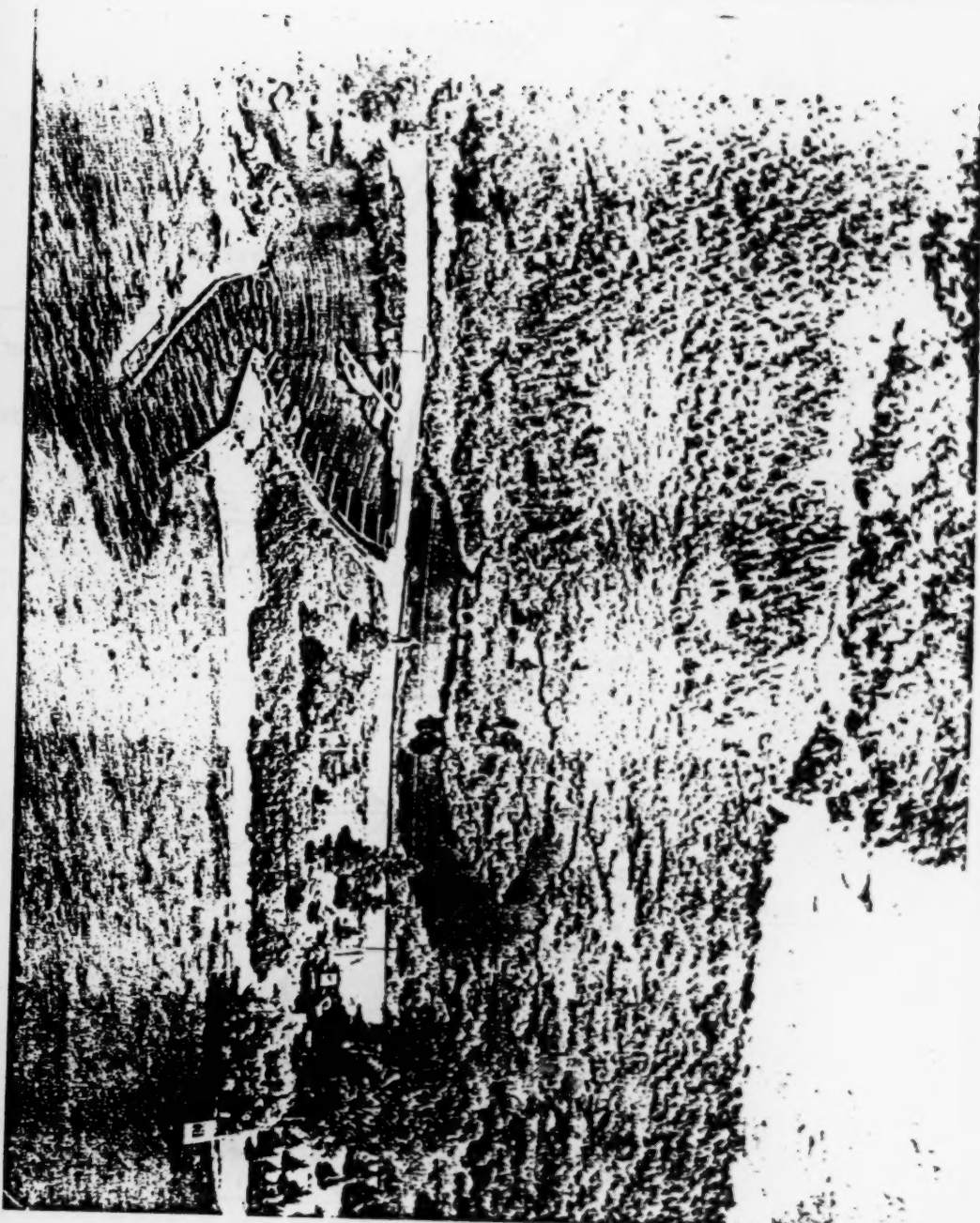


EXHIBIT 33
102

Ex 33

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Box 125
Brule, WI 54820

(Ex. 4)

November 4, 1983

3500

Mr. Thomas Trudeau
Superior Development Corporation
P.O. Box 70
Bayfield, WI 54814

Dear Mr. Trudeau:

This is to summarize our meeting at the site of the proposed Marina Point Condominium development on Madeline Island on 11/1/83.

We have the following comments regarding your proposal.

1. It was agreed that the parcel in question is a wetland as was evidenced from vegetation types and the presence of standing water. The Corps of Engineers indicated that development in this wetland would fall under their jurisdiction and permit requirements.
2. Any excavation with respect to creation of any artificial waterway, ditch, pond, lagoon or similar waterway connecting to existing navigable water or within 500 feet of any navigable water requires a State of Wisconsin permit under 30.19, Statutes. (Copy attached).

To: Mr. Thomas Trudeau

November 4, 1983

Page 2

3. Applicable local and county shoreland and floodplain regulations must be complied with by any proposed development in this area including setbacks, flood protection elevations, and sanitary requirements. The Ashland County Zoning office should be consulted to determine minimum flood protection elevation as the area appears to be in the floodplain zone.

In general, as we indicated on-site, the property in question is not what we would consider a good building site because of low elevation, the presence of standing water, and the fact that the area is wetland. It is the mandate of the State Natural Resources Board that we consider proposals affecting wetlands with the presumption that wetlands are not to be adversely impacted or destroyed by these actions. Reasonable alternatives which would eliminate or minimize adverse impacts on wetlands must be considered in any regulatory decision. It is our recommendation that an upland site alternative be explored in this case.

If you have any questions about the above comments or state permit requirements or policies, please contact me at the Brule Area office.

Sincerely,

Duane J. Lahti
Water Management Specialist

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To: Mr. Thomas Trudeau
November 4, 1983
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DJL:d

cc: Larry Hildebrandt,
Ashland Co. Zoning
Dorothy Burnmeister,
Chairman, Town of La Pointe
Dave Dralle,
Corps of Engineers, St. Paul
Jack Donatell,
NWD
Don Curwick,
KKE Architects, Minneapolis

ISSUES PRESENTED FOR REVIEW

1. IS IT A VIOLATION OF SECTION 30.12 OF THE WISCONSIN STATUTES, WHICH PROHIBITS PLACING ANY STRUCTURE UPON THE BED OF NAVIGABLE WATER, FOR AN OWNER TO CONSTRUCT A RESIDENTIAL HOUSING PROJECT ON ITS LAND, WHICH HAS BEEN IN PRIVATE OWNERSHIP SINCE 1856, CONTAINS NO NAVIGABLE WATER, AND CANNOT BE USED FOR BOATING, FISHING, HUNTING, TRAVEL, RECREATION OR ANY OTHER PUBLIC USE, SIMPLY BECAUSE A CULVERT EXISTS UNDER A ROAD THAT SEPARATES THE LAND FROM THE SHORE OF LAKE SUPERIOR?

The Circuit Court dismissed the State's claim that the statute was violated. The Court of Appeals reversed and held that the existence of the culvert made any part of Developers' land below the ordinary high-water mark of Lake Superior a part of Lake Superior.

2. DID THE COURT OF APPEALS COMMIT PLAIN ERROR IN FINDING THAT THE EVIDENCE DEMONSTRATED THAT THE

PROJECT SITE WAS
"ORIGINALLY PART OF THE
BASIN, WHICH WAS ENLARGED
TO BECOME THE PRESENT-DAY
MARINA" AND THAT THE TRIAL
COURT "DID NOT MAKE A
FORMAL FINDING WHETHER THE
SITE WAS HYDRAULICALLY
CONNECTED TO LAKE
SUPERIOR?"

The trial court found that the State did not meet "its burden of proof concerning the height and sufficiency of the hydraulic connection." The Court of Appeals held that the trial court "did not make a formal finding whether the site was hydraulically connected to Lake Superior" and, based upon its own reading of the evidence found "that the project site was originally part of the basin, which was enlarged to become the present-day marina."

3. DID THE COURT OF APPEALS ERR NOT ONLY IN REVERSING THE TRIAL COURT'S FINDING THAT THE DEVELOPERS HAVE TITLE TO THE LAND UNDER THE DOCTRINE OF RELICTION BUT ALSO IN HOLDING THAT

THE CONSTRUCTION OF A ROAD
BETWEEN THE LAKE AND THE
DEVELOPERS' PROPERTY DID
NOT ALLOW THE DEVELOPERS
TO TAKE TITLE UNDER THE
DOCTRINE OF ACCRETION?

The trial court found that "if there ever was a hydraulic connection between the project site and Lake Superior it has receded to such a point that the State as trustee for the public has no interest in the project site land." The Court of Appeals reversed the trial court's finding that the Developers took title under the doctrine of reliction and also held that the construction of the road between the lake and the Developers' property did not allow the Developers to take title under the doctrine of accretion.

4. IS CERTIORARI REVIEW UNDER
WIS. STAT. § 59.99 THE
STATE'S EXCLUSIVE MEANS OF
CHALLENGING THE BOARD'S
DECISION TO GRANT A
VARIANCE OF A LOCAL
FLOODPLAIN ZONING

ORDINANCE OR MAY THE STATE, WHICH HAD NOTICE THAT THE VARIANCE WAS GRANTED BUT FAILED TO SEEK CERTIORARI, SEEK THE REMOVAL OF BUILDINGS, CONSTRUCTED IN ACCORDANCE WITH THE GRANTED VARIANCE, AS A PUBLIC NUISANCE AFTER THE TIME FOR CERTIORARI CHALLENGE HAS PASSED?

The circuit court found that the State, as an interested and aggrieved party, did not apply for certiorari within 30 days of the filing of the Board's decision, as required by Wis. Stat. § 59.99(10) and therefore could not raise the issue of an alleged improper granting of the variance. The Court of Appeals held that certiorari was not the exclusive means of challenging the variance and that Wis. Stat. § 87.30(2), authorizing the State to enjoin a public nuisance, provided an alternative remedy.

5. IS A BOARD OF REVIEW REQUIRED TO MAKE SPECIFIC WRITTEN FINDINGS IN SUPPORT OF ITS DECISION TO

GRANT A VARIANCE TO A
FLOODPLAIN ZONING
ORDINANCE?

The circuit court determined that the State was present at the hearing at which the variance was granted and that the Board's minutes demonstrated that the Board was aware of and considered all of the applicable law and necessary criteria when it granted the variance. The Court of Appeals held that written findings were necessary for meaningful judicial review and remanded to the circuit court with directions to remand the matter to the Board to make formal findings.

STATEMENT ON ORAL ARGUMENT
AND PUBLICATION

This case presents questions of law regarding the proper method of determining the outer boundaries of a navigable lake and the correct procedure for appealing a Board of Adjustment's grant of a floodplain zoning variance.

Because the issues, which have a statewide impact, would be clarified by a full discussion of the facts and law, the Developers of the condominium project request the Court to hear oral argument and publish its decision.

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